Supreme Court, U. S.
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No. 77-777

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALICE MILLER, PETITIONER

v.

PATRICIA ROBERTS HARRIS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner seeks review of the court of appeals' holding that the statute of limitations barred her civil rights action.

1. From February 1963 to June 8, 1965, petitioner was employed by the Housing Authority of the City of Los Angeles, a municipal agency placed in the possession of the Department of Housing and Urban Development "pending the resolution of financial difficulties" (Pet. App. 8). On the latter date, petitioner was discharged for "[i]nsubordination, inattention or dereliction of duty, discourteous treatment of fellow employees, unwillingness to cooperate in the overall operations of the office, and

evident discontent with work assignment" (*ibid.*). On August 9, 1966, the Board of Commissioners of the Authority upheld her firing (*id.* at 9).[1]

On January 20, 1971, more than five and one-half years after being discharged and nearly four and one-half years after the Board of Commissioners upheld her discharge, petitioner brought this action in the United States District Court for the District of Columbia.[2] She contended, among other things, that she was fired and denied her right to full agency review because she is Jewish, female and white, and that various members of the Authority and the Department conspired to deny her the equal protection of the laws (Pet. App. 9). The complaint sought back pay, damages for suffering, and restoration of petitioner's right to an intra-agency appeal (*ibid.*).

The district court initially rejected petitioner's claims and entered an order alternatively (a) dismissing the action for failure to state a claim for relief and for lack of jurisdiction, and (b) granting summary judgment for defendants (Pet. App. 4). The court of appeals reversed and remanded the case for further proceedings (*id.* at 4-7).[3]

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[1]Petitioner brought a state court suit seeking reinstatement, but the state court ruled against her (Pet. App. 9).

[2]The case was transferred in December 1971 to the United States District Court for the Central District of California.

[3]It found her claims cognizable under various statutes and also held that the record was inadequate to support a grant of summary judgment; that petitioner's claims were not barred by laches, although the statute of limitations might apply; and that the record was inadequate to determine whether petitioner's unsuccessful state court action was a basis for defendants to invoke the doctrine of collateral estoppel in this lawsuit.

On remand, the district court held that petitioner's suit was barred by the applicable three-year statute of limitations, California Code of Civil Procedure § 338(1) (West 1954) (Pet. App. 8-10).[4] The court of appeals affirmed (Pet. App. 1-2). It explained (*id.* at 2) that petitioner's "cause of action accrued in 1966, [and] her complaint revealed on its face that her claim was barred unless she could demonstrate some basis for tolling the statute." On the question of tolling, the court of appeals stated that the statute began to run no later than the time when "it became obvious that the Government would accord [petitioner] no further administrative relief" (*ibid.*).

2. The decision of the court of appeals is correct. Petitioner did not commence this action within the three-year limitations period. Petitioner was discharged on June 8, 1965, the Board of Commissioners upheld her firing on August 9, 1966, and she filed her complaint on January 20, 1971.

In an effort to avoid the time bar, petitioner argues that summary judgment was improper (Pet. 6). She contends (Pet. 6-8) that her affidavits show that she relied on representations made by government employees that the federal government was not the appropriate authority to grant the relief sought and that her reliance on these representations tolled the statute of limitations.

But petitioner also concedes (Pet. 6) that "the record supports the conclusions drawn by both the Courts below." Those conclusions include a finding by the court of appeals (Pet. App. 2) that "the record abundantly indicates that [petitioner] never relied upon the statements

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[4]There is no dispute that § 338(1) of the California Code of Civil Procedure is the applicable statute of limitations.

claimed to have been made by government representatives." Under these circumstances it was appropriate summarily to dismiss petitioner's complaint. The adequacy of the record for summary judgment is, in any event, a factual issue that plainly does not warrant further review.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

[5]Even if there were a colorable claim of reliance on alleged misrepresentations here, it is generally established that, as against the government, petitioner would not be entitled to benefit from her reliance. *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380.